Supreme Court Of The United States

No. 75-459

DANIEL T. TAYLOR, III

Petitioner

vs.

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION

Respondent

Supreme Court, U. S.
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ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE

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SUPREME COURT OF THE UNITED STATES

No. 73-473

DANIEL T. TAYLOR, III — *Petitioner*

versus

JOHN P. HAYES, JUDGE
JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND
DIVISION — *Respondent*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

BRIEF OF THE LOUISVILLE BAR ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Louisville Bar Association was established in 1900, originally comprising a small group of attorneys in the local community. Over the years, the Association has gradually grown to a membership numbering over 1,000 attorneys and judges from the entire metropolitan area. The purposes of the Association, as enumerated in its constitution, are to promote and maintain high standards for the legal profession; to promote legal educa-

tion; to cultivate association and acquaintance among the members of the Bar; to increase their usefulness in the administration of justice; and to promote legal and judicial reforms.

In furtherance of these goals and in the interest of its membership, the Association submits this brief. This case is one that arises out of the use by the trial judge of the Summary Contempt Power, a power which stands as an anomaly in our law, wherein the accused is often denied normal Constitutional rights that are guaranteed to criminal defendants in virtually all other types of crimes. This summary power was used against the Petitioner to obtain his conviction. However, the questions raised in this Appeal do not concern Daniel Taylor alone. Since all persons and particularly attorneys, who are ethically bound to provide effective counsel for their clients, are subject to this nearly despotic power, this case involves questions of Constitutional law which far transcend the particular facts. It is not our intention to become an advocate for the Petitioner and we adopt his position only insofar as the issues herein apply to all attorneys in that they might suffer conviction under the same procedures used against the Petitioner.

The Louisville Bar Association raises the question of whether the judiciary shall continue to possess this summary power which is exercisable in violation of the Constitutional rights of all those who appear in the courtroom. This question is of a vital concern to all practicing attorneys, not only in Louisville, but in every courtroom across the country. It should be pointed out that this Appeal, even from the Petitioner's standpoint,

does not reach the question of guilt or innocence. The appeal challenges the procedures by which the conviction was obtained.

Thus, the membership of the Louisville Bar Association has a vested interest in the outcome of this case as it relates to the balance between the summary contempt power of a judge and the Constitutional rights of an attorney zealously representing his client.

SUMMARY OF ARGUMENT

I. At the conclusion of the summary contempt proceeding conducted by the trial judge, the Petitioner stood accused, convicted, and sentenced of a serious crime. His sentence was far in excess of the penalty which would entitle him to a jury trial on the charges. He was denied a jury trial because the Trial Court and the Court of Appeals of Kentucky reduced his sentence. The Amicus maintains that the original sentence should determine the right to a trial by jury. Later reductions in the sentence do not affect the seriousness of the crime. Therefore the Petitioner was unconstitutionally denied his right to a jury trial.

Various loopholes now exist through which an alleged contemnor can be denied a jury trial when charged with a serious crime of contempt. The Amicus respectfully urges the Court to tighten the Constitutional standards that control contempt by adopting the following rules: 1) The sentence originally imposed by the trial judge determines the seriousness of the crime. Later reductions of the sentence do not affect that determination; and 2) In the case of multi-

ple petty contempts, the sentences must be aggregated to determine the seriousness of the crime for jury trial purposes.

Alternatively, the Amicus respectfully contends that contempt should be treated like any other crime for jury trial purposes. Since the possible penalty for contempt is unlimited, an alleged contemnor should be given a jury trial in all cases where imprisonment is contemplated.

II. When the Petitioner was sentenced at the conclusion of trial he attempted to speak in his defense. The trial judge responded by cutting off his attempt and threatening to forcibly silence him. The trial judge waited until the end of trial to pass sentence and the Petitioner was denied his Constitutional right to Due Process of Law, when he was prevented from speaking in defense or mitigation of his crime. This right, the right of allocution, is one of the oldest principles of Common Law. All alleged contemnors should be given the right to speak before imposition of sentence, even in the cases where contempt occurs before the judge in open trial.

The Amicus respectfully urges the Court to guarantee to all alleged contemnors a full Due Process hearing before conviction and the imposition of sentence. Justice and fairness would best be served if this were the case. The contempt power would be just as effective. Since this Court has extended Due Process guarantees even to the deprivation of private property in a civil action, the time is long overdue that Procedural Due Process be guaranteed to alleged contemnors before conviction and before criminal penalties can be imposed.

III. The Petitioner was denied his Constitutional right to a fair trial before an impartial magistrate because the trial judge had adopted an adversary posture towards him. This adversary posture was evidenced by certain remarks made about the Petitioner by the trial judge, and by the unusual manner in which he passed sentence. The Court of Appeals of Kentucky held that the judge was not disqualified from passing judgment upon the Petitioner because of bias. However, the Court of Appeals did not consider the adversary posture test.

In the contempt situation the judge is called upon to play the roles of complainant, judge, jury and disciplinarian. Because of human frailty and the fact that judges often view attacks upon the court as personal attacks, the chances against a judge remaining fair and impartial are very great. It would be more realistic to assume that no judge before whom allegedly contemptuous acts are committed can properly and fairly conduct a summary contempt proceeding in a manner that would conform to the fair trial before an impartial magistrate test of Due Process.

Therefore, the Amicus respectfully submits that if the right to a fair trial before an impartial judge is to be guaranteed, then a judge other than the one who witnessed the alleged contempt should conduct a hearing on the charges. The role of the trial judge should be limited to a citation for contempt that would be equivalent to an indictment. The contemnor would have to answer the charges before another judge in a hearing after the conclusion of trial. The Amicus is convinced that the power to cite for contempt, combined with the physical restraints that were approved in *Illinois* v.

Allen, 397 U.S. 337, 344 (1970), is adequate for the judge to maintain control of the courtroom.

ARGUMENT

INTRODUCTION

THE SUMMARY NATURE OF THE CONTEMPT POWER SHOULD BE FORECLOSED BECAUSE IT IS FAR IN EXCESS OF THE POWER NECESSARY TO SERVE THE ENDS FOR WHICH IT EXISTS.

As previously stated, this case involves questions of Constitutional law which far transcend the particular facts and the interest of the Petitioner. In keeping with our role as spokesman for our membership and in the interest of all practicing attorneys, the Amicus presents this introductory discussion of the contempt power. The recommendations of the Amicus which follow would virtually foreclose the summary nature of the contempt power if they are adopted by the Court. If the Court is to act upon the general nature of contempt power, then a discussion of the power as it has evolved and exists at present is appropriate. Therefore, the Amicus presents this introduction to give perspective and support to the argument that follows.

The Summary Contempt Power stands as an anomaly in the law, which is contrary to the spirit and purpose of the Constitution and Bill of Rights. Since this power is far in excess of the power needed by the judiciary to adequately serve the ends for which it exists, it should be severely restricted. This Court should no longer countenance the summary disposition of contempt charges without all the normal Due Process guarantees

enjoyed by virtually all other criminal defendants.

The arbitrary nature of the contempt power and the dangers of its abuse have long been recognized. As Edward Livingston said in 1873; 1 *Edward Livingston Works*, 260 (1873):

> "An offense so ill defined, so liable to be imputed, embracing such a variety of dissimilar acts, would be dangerous and oppressive in the extreme, were it to be prosecuted according to the ordinary forms of law; but all these are disregarded."

The Amicus believes that the abuse so long feared is now upon us. At the time of the adoption of our Constitution the penalties for contempt were trivial. In *United States* v. *Barnett*, 376 U.S. 681, 748 (1964), Justice Black in a study of the evolution of the contempt power said:

> "The available evidence of the practice in criminal contempt cases also suggests that punishments were trivial. This practice was described by Chief Justice Kent in 1809 as follows: 'There is no such thing as an abuse of this power in modern times. The case probably is not to be found. An alarm cannot be excited at its existence, in the extent now laid down . . . . The tendency of the times, is rather to induce the courts to relax, than increase in the severity of their ancient discipline, to exercise their power over contempts with extreme moderation.' "

It has been noted that there seems to be no reported case prior to 1914 which imposed a sentence of more than one year for contempt. *United States* v. *Green*, 241 F.2d 631, 634 (CA 2 1957). Also in *Barnett*, supra, p. 753, Justice Black found that severe penalties for contempt were of recent origin:

> "The imposition of serious penalties for criminal contempts is a relatively recent phenomenon. From the foundation of the Republic until 1957 I am aware of only two isolated instances of imprisonment for longer than six months for criminal contempt brought to the attention of this Court. *In re Savin*, 131 US 267, 33 L ed 150, 9 S Ct 699 (one year); *Hill* v. *United States ex rel. Weiner*, 300 US 105, 81 L ed 537, 57 S Ct 347 (two years). Since 1957, however, our attention has been called to at least six instances where imprisonment of a year or more was imposed."

The courts no longer exercise their power of contempt with extreme moderation. Recent cases have imposed excessive sentences for contempt. *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971) 11-22 years; *Taylor* v. *Hayes*, Ky., 494 S.W.2d 737 (1973) original sentence, 54 months; *United States* v. *Seale*, 461 F.2d 345 (CA 7 1972) 4 years. In 1962, the average sentence for convicted contemnors received in federal prisons was 6.4 months, thus making the average contempt a serious crime. *The Federal Prison System - 1964*, hearing before the Sub-Committee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Congress, 2d Sess. (Jan. 22, 1964), p. 10. The crime of contempt has changed in the years since the nation was founded, from a petty or trivial offense to a most serious and infamous crime.

The crime of contempt has met with increasingly severe penalties for two reasons. First, because of its arbitrary nature, this nearly despotic power has grown in and of itself. Second, because the courts view themselves as under seige in an age of political unrest

that challenges our most sacred institutions.

A recent statement of the Court of Appeals of Kentucky in the case of *Arnett* v. *Meade*, Ky., 462 S.W.2d 940, 948 (1971), evidences this attitude:

> "But times have changed. Some elements of our society are fomenting disrespect for the courts and encouraging contemptuous conduct. The courts are confronted with a serious threat to the structure of our system of justice. Dollar and time limits suitable for conditions of the previous century are not adequate for the conditions of today."

However, it appears that the courts of this country are laboring under a misconception. Cases such as the Chicago Seven Conspiracy Trial and the New York Black Panther Trial have received an inordinate amount of media coverage. The coverage of such trials has fostered an opinion among the public and the bar, that the courts are under a concentrated attack. The judiciary, the organized bar, and state legislatures have reacted very strongly to this supposed threat.

In order that a scientific study of this problem might be undertaken, the Bar of New York City impaneled a special committee. The committee surveyed one-third of the federal trial judges on the problem of disorder in the courts. Their findings were most revealing; *Disorder in the Court,* Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct, p. 6 (1973):

> "Based on these figures the total incidence of courtroom disorder leading to a contempt conviction in the federal system is less than one-fifth of 1 percent of the criminal trials, and an even lower percentage of the total trials."

It is evident from the study that the majority of contemnors are not radicals bent on tearing down the courts but rather ordinary felons, undoubtedly bewildered and frustrated by the situation they find themselves in.

Contempt does not present a political problem nor does it present a problem which could be considered statistically important. The total incidence of courtroom disorder leading to contempt in the federal system is less than one-fifth of one percent of the criminal trials. *Disorder in the Court*, p. 8.

The Amicus must conclude that the vast increase in penalties for contempt cannot be justified. This increase has arisen from the arbitrary nature of the power itself. As Justice Black recognized in *Green* v. *United States*, 356 U.S. 165, 208-209 (1958), the Constitution and the Bill of Rights were adopted as checks upon such arbitrary powers in the hands of those in authority.

> "I cannot help but believe that this arbitrary power to punish by summary process as now used, is utterly irreconcilable with first principles underlying our Constitution and the system of government it created—principles which were uppermost in the minds of the generation that adopted the Constitution. Above all that generation deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official, particularly when it came to punishing alleged offenses against the state."

It is the absence of procedural limitations on the contempt power which is most directly responsible for the tremendous growth in penalties imposed over the years.

The summary contempt power has been perpetuated because it has generally been viewed as indispensable.

In the words of Chief Justice Taft, "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the Court is most important and indispensable." *Cooke* v. *United States*, 267 U.S. 517, 539 (1925). The necessity for this power is subject to question because the courts in Civil Law countries do not have such a power and yet continue to operate with success. Moreover, Civil Jurisprudence does not even recognize the Common Law concept of contempt. Pekelis, *Legal Techniques and Political Ideologies*, 41 Mich. L. Rev. 665 (1943). Clearly a judicial system would not stop functioning if it did not have a summary contempt power.

The Amicus does not contend that the contempt power be abolished. However, its summary nature should be foreclosed because other measures would be just as effective in controlling the course of a trial. The exercise of the contempt power must be "the least possible power adequate to the end proposed." *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966); *Anderson* v. *Dunn*, 6 Wheat 204, 231 (1821); *In re Michael*, 326 U.S. 224, 227 (1945).

The Amicus respectfully urges this Court to foreclose the summary nature of the contempt power by; 1) guaranteeing a jury trial to all alleged contemnors when imprisonment is contemplated; 2) by guaranteeing a full Due Process hearing at the conclusion of trial on the charges; 3) by requiring that a judge, other than the one before whom the allegedly contemptuous acts occurred, conduct the hearing.

If impartiality and fairness are to be the virtues of our courts then we must guarantee all criminal defendants those procedural safeguards upon which our system of laws is based. The demise of the summary nature of the contempt power will, in the long run, generate greater respect for our judiciary. We close this introduction with a statement of Justice Black in *Green* v. *United States*, 356 U.S. 165, 218 (1958):

> "In the last analysis there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state."

I

WHEN AN ALLEGED CONTEMNOR IS SENTENCED TO PUNISHMENT IN EXCESS OF THE REQUISITE AMOUNT TO ESTABLISH THE CONTEMPT AS A SERIOUS CRIME, THEREBY GUARANTEEING THE DEFENDANT THE RIGHT TO A TRIAL BY JURY ON THE CHARGES, THE TRIAL JUDGE AND THE APPELLATE COURT SHOULD NOT BE PERMITTED TO ALTER THE SENTENCE AT A LATER TIME TO FORECLOSE THE DEFENDANT'S RIGHT TO A TRIAL BY JURY.

At the end of trial, the judge sentenced the Petitioner on nine counts of contempt. The sentences, which ranged from thirty (30) days to one year, were ordered to be served consecutively. Thus, the Petitioner faced a total of fifty-four (54) months imprisonment. Apparently the trial judge realized that the one year sentences entitled Daniel Taylor to a jury trial on the charges.

Consequently the judge, although not until four months after he had sentenced Mr. Taylor, reduced the sentence for two specifications of contempt from one year each to six months each. This reduced the total sentence to forty-one (41) months and, as the judge erroneously assumed, also foreclosed the Petitioner's right to a trial by jury.

Unfortunately, the trial judge neglected to specify in his corrected judgment whether the sentences were to be served consecutively or concurrently. Applying the judge's intent at trial, where he ruled that the sentences were to be served consecutively, it could be surmised that this intent had not been changed. However, when the case was appealed by the Petitioner, the Court of Appeals of Kentucky held that because the sentences were not specified as to concurrently or consecutively, they were to be served concurrently. Thus, the sentence would be six months and for this reason Taylor did not have the right to a jury trial.

The Court of Appeals of Kentucky followed two recent decisions of substantial import which indicated that the reduced total sentence would still give Mr. Taylor the right to a jury trial. The Supreme Court in the case of *Bloom* v. *Illinois*, 391 U.S. 194 (1968), found contempt to be an ordinary crime and ruled that in determining the seriousness of the crime, for the purpose of the right to a jury trial, one looks to the penalty *actually imposed* as the best evidence thereof. In accordance with an earlier decision in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), applying the right to a jury trial to the states, the Court found that since the penalty actually imposed exceeded six months, the contempt was

a serious crime entitling the Petitioner therein to a trial by jury.

The Court of Appeals for the Seventh Circuit in the cases of *United States* v. *Seale*, 461 F.2d 345 (CA 7, 1972) and *In re Dellinger*, 461 F.2d 389 (CA 7, 1972), applied the decision in *Bloom* to the area of multiple petty contempts which had arisen out of the Chicago Seven conspiracy trial. They ruled that where a contemnor has been found guilty and sentenced to imprisonment for multiple petty contempts, the Court will aggregate the sentences, and the total sentence will be the *penalty actually imposed* for the purpose of determining the right to a jury trial.

However, in holding that under *Bloom*, *Seale* and *Dellinger*, the Petitioner did not have a right to a jury trial, the Court of Appeals completely overlooked the rules laid down in two of their recent decisions. In *Beasley* v. *Wingo*, Ky., 432 S.W.2d (1968) the Court held that sentencing was in the discretion of the trial judge, not the Appellate Court. In *McBride* v. *Commonwealth*, Ky., 432 S.W.2d 410 (1968) the same Court held that sentences which do not specify between concurrently or consecutively are to be served *consecutively*. The Court of Appeals of Kentucky neglected to either cite, overrule, or even comment on these two recent decisions precisely on point. One can only conclude that the Court of Appeals of Kentucky mistakenly overlooked these decisions and were in error in the Taylor decision. The Constitutional guarantee to a trial by jury is one of the most cherished rights a person has. Throughout our history this right has been jealously guarded by our Courts. We respectfully contend that the

Supreme Court of the United States should not countenance an after the fact alteration of a jail sentence by the trial judge, or an oversight, mistake, or error by the Court of Appeals of Kentucky to deny an attorney his Constitutional right to a trial by jury.

The Amicus believes that the original sentence should determine the seriousness of the crime and that later reductions in the sentence made in a spirit of merciful justice, do not alter that determination. Therefore, post-trial reductions in the sentence should not be allowed to infringe upon the accused's Constitutional right to a jury trial.

The decisions of this Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966), *Bloom* v. *Illinois*, 391 U.S. 194 (1968), and *Baldwin* v. *New York*, 399 U.S. 66 (1970), leave three loopholes through which an alleged contemnor may be denied his Constitutional right to a jury trial without violation of the letter of the above decisions. First, the Appellate Court can merely reduce the sentence imposed, as they did in this case, no matter how serious the trial judge viewed the crime. Second, the trial judge can rule that each citation for contempt was for a separate offense, whereupon the judge may impose multiple sentences of six months and thereby sentence the accused to a term far in excess of the penalty necessary to attach the jury trial requirement. The accused is denied the right to a jury trial because no one sentence on the separate crimes exceeds six months. Although the Seventh Circuit has ruled that the sentences on multiple petty contempts must be aggregated to determine whether the jury trial right attaches, *United States* v. *Seale*, 461 F.2d 345 (CA 7,

1972); *In re Dellinger*, 461 F.2d 389 (CA 7, 1972), the Supreme Court has yet to adopt the rule therein as a Constitutional standard. Third, since the appellate court can later reduce the sentence, thereby denying the contemnor the right to a jury trial, the accused can be severely chastized before the court, sentenced to a very long term of imprisonment, made to run a professional guantlet, and still be denied this basic Constitutional right.

In the case of Daniel Taylor, the trial judge did everything he could to impress upon the accused, the Bar and the community, the severity of Taylor's crime. The sentence that the judge imposed left no doubt about the seriousness of the offense. Taylor faced possible professional discipline or disbarment, loss of his clientele, and 54 months in prison. The judge in commenting upon Taylor's conduct said:

> "For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law . . .
>
> It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago." (T.R. 2288)

When the Court of Appeals of Kentucky handed down their opinion on appeal of the conviction, they characterized Taylor's actions thus; *Taylor* v. *Hayes*, Ky., 494 S.W.2d 737, 741 (1973):

> "There is no necessity of detailing the innumerable acts of Taylor which clearly reflected his contempt for the court as well as the judicial system of this Commonwealth. His actions were such as to place on trial the entire judicial system of the Com-

monwealth and those judges sworn to uphold its Constitution and laws and thereby assure defendants a fair, orderly, and speedy trial."

Yet, in spite of this, the Court of Appeals reduced the sentence to six months and ruled that Dan Taylor had not committed a serious crime which would entitle him to a jury trial. Apparently, the only fact that the Court of Appeals considered in ruling on the jury trial question was the reduced sentence. It is abundantly clear in this case that other extrinsic evidence firmly establishes the seriousness of the alleged offense.

The circumstances and actions which preceded the denial of a jury trial to the Petitioner in this case demonstrate the need for further changes in the Constitutional standards that govern this Sixth Amendment guarantee. Therefore the Amicus respectfully urges this Court to hold the following: 1.) The sentence originally imposed by the trial judge determines the seriousness of the crime and later reductions of the sentence do not affect that determination; and 2.) In the case of multiple petty contempts, the sentences must be aggregated to determine the seriousness of the crime for jury trial purposes.

Alternatively, the Amicus respectfully submits to this Court that there is no justification for denial of the right to a jury trial in any case where the accused faces imprisonment *possibly* in excess of 6 months.

This Court in *Bloom* v. *Illinois*, 391 U.S. 194 (1968) rejected the sui generis approach to the contempt power and held that contempt is a crime in the ordinary sense. Moreover, Justice White in the majority opinion felt that there were even more compelling reasons to

guarantee the right to a jury trial for contempt than for other crimes; *Bloom*, supra p. 201:

> "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperment. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court."

In *Frank* v. *United States*, 395 U.S. 147 (1969), Mr. Justice Marshall, speaking for the Court in a decision which held that it was not the *authorized* punishment but rather the *actual* punishment which was determinative of the right to a jury trial in the contempt context said:

> " . . . for purposes of the right to trial by jury, criminal contempt is treated just like all other criminal offenses. The defendant is entitled to a jury trial unless the particular offense can be classified as 'petty' ".

Frank presents a contradiction. While the Supreme Court ruled that contempt was to be treated the same as other crimes for the purpose of jury trial, in actuality, for all other crimes invocation of the right to a jury trial is predicated on the *possible* punishment not the *actual* punishment. Every accused contemnor, where the judge contemplates imprisonment, should be guaranteed the right to a jury trial on the theory that his maximum punishment is unlimited. Since this approach is Con-

stitutionally mandated for all other crimes, there seems to be no reason to treat the crime of contempt differently.

Wherefore, the Amicus respectfully urges the Court to reverse the conviction below and rule that an alleged contemnor must be guaranteed the right to a jury trial in all cases where imprisonment is contemplated.

II

THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW REQUIRES THAT IN ALL CONTEMPT SITUATIONS AN ALLEGED CONTEMNOR MUST BE PERMITTED TO SPEAK IN DEFENSE OR MITIGATION OF THE CHARGES AGAINST HIM, INCLUDING THOSE CONTEMPTS COMMITTED BY AN ATTORNEY IN THE PRESENCE OF THE TRIAL JUDGE, BEFORE HE IS ADJUDGED GUILTY AND SENTENCE IS IMPOSED.

At the conclusion of trial, the judge called the Petitioner before him and proceeded to sentence him on the contempt citations brought during the trial. The Judge openly attacked the Petitioner's character, his motives, and his professional qualifications and announced his intention to make an example of the Petitioner before the Bar and the local community. Before sentence was imposed upon the contempt citations, the Petitioner attempted to respond to the charges against him but was prevented from doing so to the extent that the Judge threatened to forcibly silence him (T.R. 2288-2290). At no time was the Petitioner allowed to say anything which might have affected the Judge's determination that criminal conduct had occurred for which the Petitioner was guilty, or that might

have mitigated the seriousness of his actions or the severity of the impending sentences.

This Court has recently held that one of the most fundamental principles of Anglo-American law is that "no one shall be punished without having had an opportunity to be heard in his defense." *Groppi* v. *Leslie*, 404 U.S. 496 (1972); following: *In re Oliver*, 333 U.S. 257 (1948); *In re Hammersmith*, 4 EX. 87, 96, 154 Eng. Rep. 1136, 1140 (1849). That the opportunity to be heard in defense or mitigation of a crime is a pre-requisite of Due Process cannot be doubted. "The fundamental requisite of Due Process is the opportunity to be heard". *Grannis* v. *Ordean*, 324 U.S. 385 (1914).

This principle is known as *audi alteram partem* ("hear the other side", *Black's Law Dictionary*, 4th Edition, p. 166). The principle is also basic to the Common Law in England. Indeed there is some evidence that it predates the Common Law and originated out of the Judeo-Christian traditions of our Anglo-American society. In the case of *The King* v. *the Chancellor, Masters and Scholars of the University of Cambridge*, 1 STR. 557, 93 Eng. Rep. 698 (1723), Mr. Justice Fortescue traced this principle back to the Garden of Eden saying:

> "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence."

In the case of *In re Pollard*, 5 Moore P.C. (N.S.) 111, 16 Eng. Rep. 457 (1868) the English Courts extended the principle to the direct contempt situation. There, the

Court held that the granting of an opportunity to make a statement in defense of the charges was essential before a sentence of contempt, even when the contempt arose out of repeated actions in open court. The principle of the Pollard case was affirmed as recently as 1958, in the case of *Samaratunga* v. *the Queen*, (1958) A.C. 424, 432. As Judge Friendly said in *United States* v. *Galante*, 298 F.2d 72, 77 (CA 2, 1972):

> "Thus has Blackstone's much quoted statement, 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination,' 4 Com. 286, been qualified in the land that gave it birth."

It appears that there have been only two cases wherein the Supreme Court has addressed the question of the contemnor's right to allocution; *Groppi* v. *Leslie*, 404 U.S. 496 (1972) and *Ex Parte Terry*, 128 U.S. 289 (1888). The *Terry* case dealt with a direct contempt that was summarily decided in open court. The accused was not afforded the right to speak in his defense. There, the Supreme Court said that the trial court was not bound to hear any explanation of the contemnor's actions

. . . .

> " . . . if it was satisfied—and we must conclusively presume, from the record before us, that it was satisfied, from what occurred under its own eye and within its hearing—that the ends of justice demanded immediate action, and that no explanation could mitigate his offense, or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment." *Terry*, Supra p. 309-310.

However, the *Terry* case was decided more than 80 years ago. Since that time there has been a vast expansion of Due Process in areas less significant than the potential imprisonment of the Petitioner herein.

The Court in *Weiss* v. *Burr*, 484 F.2d 973, 985 (CA 9 1973) characterized this change thus:

> " . . . in the decades since *Terry* was decided, there has, without question, been a marked increase in the Supreme Court's sensitivity to procedural due process. The mainstream of the decisions involving that doctrine is now, and for some years has been, represented by the cases which require that notice and hearing be granted before deprivations of liberty or property take effect. The importance of notice and meaningful opportunities to be heard has been recognized in criminal proceedings and in numerous areas involving issues less significant than the loss of liberty and the damage to Weiss's professional hopes which are threatened here."

There are two generally recognized justifications for the exercise of the summary contempt power. First, the power may be used when it becomes necessary to preserve order in the court and the integrity of the judicial process. Second, the summary power may be used by the trial judge to prevent the waste of judicial resources when he has personally witnessed the conduct in question, *United States* v. *Meyer*, 462 F.2d 827, 831 (CA DC 1972). We are concerned here with the first justification of preserving order in the courtroom.

This Court held while reversing the conviction of the petitioner in the case of *Groppi* v. *Leslie*, 404 U.S. 496 (1972) that where the defendant had committed an indirect contempt, a legislature could not summarily con-

vict the petitioner because there was no justification for the summary procedure employed.

> " . . . Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' "

The *Groppi* case is more applicable to the case of Daniel Taylor than *Terry*, because the judge postponed the sentencing of Mr. Taylor until the end of trial. Thus, as in *Groppi*, supra, there was no justification for proceeding summarily and denying the accused the right to speak in defense or mitigation of his crime.

The Court of Appeals for the Ninth Circuit in the case of *Weiss* v. *Burr*, 484 F.2d 973 (CA 9 1973), adopted the above rationale and reversed the conviction of a direct contemnor who had been convicted and sentenced without an opportunity to speak in his defense. The Court there ruled that the right of allocution was fundamental to Due Process and said:

> "Since the distinctions between this case and Groppi are essentially meaningless, that case is, as we view it, controlling. It requires us to hold that because the trial judge delayed the disposition of the citations, and at the time of sentencing was not acting to quell a courtroom disruption to preserve the dignity of the court, or to protect the safety of court personnel, allouction was required and its denial was violative of procedural due process."

Since the trial judge delayed disposition of the contempt charges against the Petitioner until the end of the trial, the first justification for the summary power—that of preserving order in the courtroom—did not exist.

Therefore, the Petitioner was denied his Constitutional right to Due Process of Law when he was summarily convicted and prevented from speaking in defense or mitigation of the crime.

The Amicus respectfully urges the Court to rule that for all contempt citations the accused has a Constitutional Due Process right to speak in defense or mitigation of the charges before the imposition of sentence. Moreover, in keeping with our belief that the summary nature of the contempt power should be foreclosed, we respectfully submit that the Court should rule that in all prosecutions for contempt, the accused will be guaranteed the right to a full Due Process hearing on the charges at the conclusion of trial. As we have suggested elsewhere in this brief, the contempt power would be just as effective if its exercise were limited to the bringing of a citation for contempt by the trial judge which must be adjudicated at the conclusion of trial in a full Due Process hearing presided over by a judge other than the trial judge.

On balance, the reasons for the continued existence of the summary contempt power do not justify the denial of a Due Process hearing on the charges because lesser measures would suffice. The inequity of the situation is especially evident when we compare contempt to other crimes. Only the offense of contempt may be punished without a hearing. All other offenses require, at minimum, a full Due Process hearing.

This Court has greatly expanded the range of Due Process procedural rights over the years. Today, even in many non-offense situations, this Court has ruled that Due Process requires a hearing as a buffer between the

indivudal citizen and the government. For example, the Supreme Court has recently held in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970) that the Due Process clause of the Fourteenth Amendment requires that the states afford an evidentiary hearing to welfare recipients before termination of their benefits; and in *Fuentes* v. *Shevin*, 407 U.S. 65 (1972), that Due Process requires a hearing before state repossession of goods on default of a buyer under a conditional sales contract. If the Due Process Clause of the Fourteenth Amendment guarantees a hearing before the deprivation of a property right, even in a civil action, then surely the time is long overdue that Procedural Due Process be guaranteed to alleged contemnors before criminal penalties can be imposed.

Wherefore, the Amicus respectfully urges the Court to reverse the decision below and guarantee to all future alleged contemnors the Constitutional right to a full Due Process hearing before conviction and imposition of sentence.

III

IN THE CIRCUMSTANCES OF THIS CASE THE TRIAL JUDGE COULD NOT IMPARTIALLY SIT IN JUDGMENT ON MULTIPLE CONTEMPT CHARGES AGAINST THE PETITIONER.

Perhaps the most fundamental and essential Due Process right guaranteed to a criminal defendant is the right to a fair trial before an impartial magistrate. The Petitioner was denied this Constitutional right when the trial judge passed sentence upon him at the conclusion of trial because the trial judge, justified or not, had adopted an *adversary posture* towards the Petitioner.

This adversary posture was evidenced by certain disparaging remarks made by the trial judge about Daniel Taylor and the unusual manner in which sentence was passed (T.R. 2288-2290).

When the trial judge sentenced the Petitioner at the conclusion of the trial, he stated that it was a shame he would have to do something that the Bar Association should have done years ago. He further stated his intention to make Daniel Taylor an example to the Bar and the local community:

> "It's a shame that this Court has to do something that the Bar Association of this State should have done a long time ago.
>
> "As far as a lawyer is concerned, you're not. I want the jury to hear this, that you're not the rule, you're the exception to the rule." (T.R. 2289)

The trial judge's open and frank statement that he was going to make the Petitioner an "example" would obviate any conclusion that the judge had remained detached and disinterested enough to give the Petitioner a fair trial before an impartial magistrate.

It was the carefully considered opinion of the Court of Appeals of Kentucky, in the decision below, that the conduct of the trial judge did not prejudice the Due Process rights of the contemnor and that there was no evidence of bias which would disqualify him from exercising his summary contempt power. The Court of Appeals applied the relevant decisions of this court and found that the trial court was not an activist seeking combat with Taylor nor "did Daniel Taylor ever indulge in any personal attacks of any kind upon the judge." *Taylor* v. *Hayes*, Ky., 494 S.W.2d 739, 744 (1973);

following: *Offut* v. *United States*, 348 U.S. 11 (1954); *Mayberry* v. *Pensylvania*, 400 U.S. 455 (1971); and *Ungar* v. *Sarafite*, 376 U.S. 575 (1964). They concluded that as long as the judge avoided becoming personally embroiled in controversy with the contemnor and the contemnor had not personally attacked the judge, they were not constrained to find bias or prejudice in the trial judge's conduct. The standard that the Court of Appeals of Kentucky applied to the conduct of the judge was not Constitutionally stringent enough to determine whether Due Process had been violated because they failed to consider whether the judge had adopted an adversary posture towards the contemnor. The case of *United States* v. *Meyers*, 462 F.2d 827 (CA DC 1972), requires disqualification of the judge where he has adopted an adversary posture towards the contemnor. In *Meyer* the Court of Appeals for the Seventh Circuit, in applying the case of *In re Murchison*, 349 U.S. 133 (1955) said:

> "The Due Process requirement of disposition by an impartial judge is threatened, not only when the contempt is of such a personal nature as to create actual embroilment or the likelihood of personal engagement of the feelings of the trial judge, but also when the judge adopts an adversary posture with respect to the alleged contemnor, even if he has not been personally attacked. *In re Murchison*, 349 U.S. 133, (1955)."

The adversary posture of the trial judge as evidenced by his actions and remarks creates a sufficient possibility of bias to make disqualification of the trial judge necessary to preserve the integrity of the judiciary and to protect the Due Process rights of the accused to a fair

trial before an impartial magistrate. *United States* v. *Meyer*, supra, p. 841.

The Amicus respectfully submits to this Court that if the right to a fair trial before an impartial judge is to be guaranteed in the contempt situation, then the judge before whom the alleged contempt took place should not be allowed to conduct the post-trial hearing on the charges or to pass sentence on the contemnor. When our judicial system places the roles of complainant, prosecutor, judge, jury and disciplinarian upon the shoulders of the same judge who must bear the brunt of the criminal conduct, and then demands that this same judge remain fair and impartial, that judicial system places too heavy a burden upon one man. No judge should be required to bear this burden.

The psychology of our jurisprudence views the judge and the court as one and the same. These words are used interchangeably in our language to identify the institution of the court when in session. Not only do citizens and attorneys who stand apart from the court view it in this manner, but the judge views himself as the personification of the court and the protector of our most sacred institution. Not only does the contemnor characteristically view his conduct as against the judge, the judge himself will frequently interpret any attack upon the court as a personal attack. Justice Jackson in his opinion in *Sacher* v. *United States*, 343 U.S. 1, 12 (1952) recognized the problem.

> "It is almost inevitable that any contempt of a court committed in the presence of the judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge

and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other."

Any judge who presides at trial and is called upon to punish contemptuous conduct would have difficulty remaining fair and impartial were he the most virtuous of men. All men suffer from human weaknesses and the men upon whom we place the responsibility of protecting our courts are no exception Justice Frankfurter outlined this human dimension in his opinion in *Sacher* v. *United States*, 343 U.S. 1, 35 (1952):

> "But precisely because a judge is human, and in common frailty or manliness would interpret such conduct of lawyers as an attack on himself personally, he should not subsequently sit in judgment on his assailants, ..."

This human dimension is not limited to the possibility that a judge may view contempt of the court as a personal attack. As Justice Black said in his dissent in *Green* v. *United States*, 356 U.S. 165, 198 (1958):

> "Like all the rest of mankind they (Judges) may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding, or by excessive zeal."

Under our present system we assume the objectivity of the judge to such an extent that the alleged contemnor is put at a great disadvantage. The trial judge may act on the contempt charges he prefers unless the contemnor can show that the judge adopted an adversary posture towards him, became personally embroiled in controversy with him, or was vehemently attacked by

him. *Mayberry* v. *United States*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *United States* v. *Meyer*, 462 F.2d 827 (CA DC 1972).

It would be more realistic to assume that no trial judge before whom allegedly contemptuous acts are committed can properly and fairly conduct a summary contempt proceeding in a manner that would conform to the fair trial before an impartial magistrate test of Due Process. Moreover one theory may be asserted which amounts to a logical truism: the judge in whose court the alleged contempt occurs is the judge least likely to deal fairly with the alleged contemnor.

Another characteristic of contempt makes it particularly difficult to deal with. Allegedly contemptuous conduct most often arises out of passion and may thus most readily arouse passionate responses in judges. When the same judge who witnesses this conduct decides upon its criminality, then the nature of the crime of contempt is made to depend on the temperance of the individual judge. Edward Livingston saw this problem long ago in his treatise on the penal laws of this country; 1 *Edward Livingston Works* 263 (1873):

> "Judges (although by vesting them with this power we treat them as angels) are men; their passions will more readily be roused by real or fancied insults than they would be by injuries, and nothing can be more at war with justice than passion. Another evil—there is no end to them—is, that from the nature of the crime, its existence must depend on the temper of the judge who happens to preside. Words which a man of cool and considerate disposition would pass over without notice might trouble the serenity of another more susceptible in his feel-

ing or irritable by his nature. There is no measure of the offense but the ever-variable one of the human mind. The judge carries the standard in his own breast."

Under the recent decisions of this Court relative to the right to an impartial magistrate which were previously cited, a parádox arises. If the alleged contemnor's behavior is serious or offensive enough to raise the presumption of judicial bias then another judge is assigned to conduct the hearing. If the allegedly contemptuous behavior is not provocative enough to raise this presumption then the contemnor must face the same judge before whom the actions occurred and all the dangers to the defendant's Due Process rights that have been cited above come into play. Where the alleged contemnor has enough restraint to prevent his acts from becoming personal attacks, the situation remains potentially appropriate for a denial of the contemnor's Constitutional right to a fair trial before an impartial magistrate. In effect, the accused is penalized for his restraint. This inequitable paradox and the dangers to an alleged contemnor's Due Process right could be cured if this Court would adopt the recommendation of the Amicus that the trial judge before whom the allegedly contemptuous actions occurred, not be allowed to conduct a hearing on the charges or impose sentence upon the contemnor.

As an alternative, the Amicus suggests a system under which the trial judge would inform the contemnor that his actions were being cited for contempt. This citation would have the same effect as an indictment and would be adjudicated at a post trial hearing conducted

by another judge. The Amicus believes that a citation for contempt during trial would have an equally deterrent effect upon the conduct of the contemnor as the threat of an immediate judgment during trial.

The assertion that the threat of immediate punishment is a more effective deterrent than the threat of punishment inflicted somewhat later, is a highly speculative one. Even shorter arguments in favor of expeditious handling of accused persons have been rejected in favor of procedural fairness in matters of police investigative techniques, *Escobedo* v. *Illinois*, 378 U.S. 478, 490 (1964) and the right to representation by counsel, *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).

The threat of subsequent criminal action, and in the case of an attorney, the additional threat of professional disciplinary hearings, should be sufficient to control contumacious behavior in most cases. In the case of litigants the recent decision in *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970) allows the court wide latitude for dealing physically with a disruptive defendant in a criminal trial:

> "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."

In the case of an attorney, if the threat of subsequent criminal action and professional discipline are not enough to restrain him, in those instances where the disruption is so great that it threatens the validity of the trial, it would be better to declare a mistrial and then

cite the attorney for contempt. This would protect the defendant and prevent a complete retrial of a long case after a reversal by an appellate court. Otherwise, the court must bear the burden of a continuous contest between the attorney and the authority of the court resulting in a detriment to all parties involved and the possibility of prejudicing the jury.

If the attorney should continue his contemptuous behavior after the conclusion of the criminal hearings on contempt and professional disciplinary hearings, the judge should then appoint another attorney or allow the defendants to obtain other counsel.

The standards of fairness that the Supreme Court has applied to the contempt situation in *In re Murchison*, 349 U.S. 133, 136 (1955), are rigorous.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law . . . But to perform its high function in the best way. 'Justice must satisfy the appearance of Justice.' ".

This rigorous standard of fairness would best be served if the trial judge were not allowed to sit in judgment of allegedly contemptuous acts committed before him during trial.

Wherefore, the Amicus respectfully urges this Court to reverse the Conviction below because the Petitioner was denied his Constitutional right to a Fair Trial before an Impartial Magistrate as guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

CONCLUSION

This case presents a valuable opportunity for the Court to reconsider the balance between the summary power of contempt and the Constitutional Due Process rights of alleged contemnors. The Amicus believes that the summary nature of the contempt power should be foreclosed because it is in excess of the power actually needed to fulfill the end proposed and is often abused. Lesser measures, which do not contravene the accused's Constitutional rights, would provide equal deterrence to contumacious conduct during trial.

Wherefore, the Amicus respectfully urges the Court to reverse the decision below and therein further restrain the summary power of contempt.

Respectfully submitted,

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